No. 11288

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MIKE RADICH and C. T. BROWN, etc.,

Appellants,

vs.

UNITED STATES OF AMERICA, etc., *et al.,*

Appellees.

OPENING BRIEF OF APPELLANTS MIKE RADICH AND C. T. BROWN.

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Statement of Pleadings and Facts Disclosing Jurisdiction of District Court.

C. B. Stratton filed an action against the United States in the District Court of the United States, Southern District of California, Central Division, alleging [Tr. pp. 2, 3] as the jurisdictional basis of his suit that it is brought pursuant to the statutes of the United States of America, particularly statute of March 3, 1887, chapter 359, sections 1 and 2; 24 Statutes 505, as amended (28 U. S. C. A., sec. 41), and the fact that he was seeking to recover upon an express contract with the United States for damages in an amount less than $10,000.

His complaint [Tr. pp. 1-4] alleges in short that the United States owes him, under and by reason of construction work, a balance of $4645.25.

To this complaint the United States interposed a counter claim and cross claim, which was later amended [Tr. pp. 19-24] and in which the United States alleged as a jurisdictional basis that their cross action is based on the provisions of Title 28, section 41, subdivision 1, U. S. C. A., and that the United States of America is the cross-complainant.

The amended cross-claim alleges that in connection with the construction of an airfield near Palm Springs which C. B. Stratton had been doing for the United States and on which the alleged balance above mentioned was due certain work was done by subcontractors, Jack Wilcox who did the paving and grading, and Walter S. Roeder who laid the water mains.

The cross claim further alleges that the present appellants Mike Radich and C. T. Brown, hereinafter referred to for brevity as appellants, owned a bulldozer; that they rented the bulldozer together with a driver thereof to Galen B. Finch, another cross defendant; that through various transfers and by devious means [which will be related in a moment and of which appellants were positively unaware] this bulldozer and the driver found its way onto the construction which Stratton, Wilcox, and Roeder were doing on the airfield; that the bulldozer did certain work there on the airfield and in doing so backed into a United States airplane parked on an airstrip, doing damage to it in the amount of $4645.25.

To this cross complaint and cross demand the present appellants interposed an answer [Tr. pp. 17-18] in which they denied that the driver of the equipment in question was acting as their employee and servant when he operated the bulldozer on the airfield and in which they further de-

nied that the driver was acting at the time in the scope of his employment. Other denials were made, but they are not necessary to be considered here, in view of the points to be raised.

The other cross defendants made similar answers and, as can be already seen, the question was, which of the several parties through whose hands the bulldozer had passed (unbeknown to appellants) was responsible for the negligent act of the driver operating the bulldozer on the airfield?

Jurisdiction of Circuit Court of Appeals.

This honorable court has jurisdiction to review the judgment rendered against appellants herein by said District Court under the provisions of Title 28, U. S. Code Annotated, sec. 225.

Statement of the Case.

We shall not attempt to give a detailed résumé of the testimony of all witnesses, but shall merely trace the migration of this equipment in a general way, filling in such details as it becomes necessary to discuss, in connection with the points raised.

We shall not summarize the evidence as far as it relates to the negligence of Clarence A. Davis (who, in order to distinguish him from Otto Davis, another defendant, will hereafter be referred to as the operator), because we concede that the trial court was justified in finding negligence in the actual operation of the equipment.

In summarizing the evidence, we shall not follow the order of witnesses as it appears in the Transcript, because

we believe the picture can be more readily grasped if we put the evidence in chronological sequence, to show the meanderings of this bulldozer.

Mr. Ferguson, one of the key employees of appellants, testified [Tr.* pp. 161-192] that the appellants are lenders of tractor equipment [164]. In the employ of the appellants is said Clarence A. Davis, (the operator) and he is also and at all times material to the controversy was on appellants' pay roll [165]. His business is that of a tractor driver [165].

About April 20 or 21, 1944, cross-defendant Galen Finch contacted appellants by telephone to rent the tractor in question [165], "for agricultural purposes between Palm Springs Village and Indio." This spot is between 14 to 17 miles away from the scene of the accident. The rental was to be at the prevailing regular OPA prices [166] with a monthly minimum of 240 hours [175] at an hourly rate and was to be under the direction of the cross defendant Finch [177, and also Exhibit E].

The rate included the services of the operator, gas, oil, maintenance, upkeep, and repairs. The operator was required to go with the equipment. This operator sent to appellants once a week a time card showing the amount of time that the equipment has been operated and the type of work that has been done by it, this being necessary because the amount of insurance to be paid on the equipment depends on that information [171]. It is not a matter of indifference to appellants to whom the equipment is rented, even though their operator is on it [172]. When

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*Hereafter the numbers in parentheses will refer to the corresponding pages of the transcript of record.

the equipemnt leaves the premises of appellants and is delivered to the lessee, the lessee directs what is to be done with it. He supervises the work [183] *and can send back to the appellants any unsatisfactory operator* [177, 186].

It goes without saying, from an inspection of the delivery receipt [Exhibit E, Tr. p. 105] that Finch was entitled to terminate the use of the equipment at any time he desired to do so. No directions are given to the operator as to when, what, where, and how he shall do his work after he reaches the lessee, but all of his instructions are given by Finch [184]. In this case, the appellants did not know until after the accident had happened that the equipment had ever ceased to work for Finch [274].

It appears from the transcript that the bulldozer in question finally and after having been used for several persons, as was found out later, ended up in Roeder's hands, for whom the last actual work was done at the airport at Palm Springs. This Mr. Roeder, also a cross-defendant, never paid appellants [187], but paid cross-defendant Wilcox, by whom he was billed [242]. Neither he nor Wilcox are known to appellants [187]. Appellants did not know that either of them were using the equipment, nor for what purpose they were using it at the time. Of course, they had an arrangement about its use with appellants.

It appears that the amount of insurance on operations such as were being done by Roeder with the equipment would have been greater than for agricultural work, the purpose stated on the delivery receipt [Exhibit E].

The operator, under the direction of Finch, was, according to the expectations and arrangements of appellants, to retain possession of the equipment [191], and the

operator was cautioned both by appellants and by Finch not to move the equipment to any other job or location without instructions by Finch [276].

As already stated, appellants exercised no control over the operation of the equipment after it reached the lessee [279-280]. It was of course a matter of interest to them that a person competent in their eyes would operate the equipment and would be there at all times, and the operator was the one who actually operated the bulldozer. He performed the mechanical manipulation of the bulldozer, he was the one, in other words, who determined what gear to shift, or what lever to pull, but the rest of his activities, that is to say, just what he should do, when he should do it, where he should do it, how he should do it, were all to be told him by Finch, the lessee, as far as appellants were concerned. Appellants at no time gave nor did they expect that anyone else would give him instructions along those lines. The foregoing is not only clear from the general trend of Mr. Ferguson's testimony but also appears explicitly on the so-called equipment rental record [Exhibit E, 105] directed to Clarence Davis, operator, and on which appear the following instructions: "Finch will direct you to location near Palm Village." Also, in the body of the instrument, "Finch will be looking for you as you go into Palm Springs."

There is this further notation as to the job description, "Clear land level 17 miles south Palm Springs on old Palm Springs road."

We skip now to the testimony of **Clarence A. Davis,** the operator. He stated that he took the bulldozer down to the location indicated [252]. He was to get

orders from Finch [253]. We are sure no one maintains that he had any power or authority to make a rental or leasing, or other disposition or transfer of the tractor. When he got to Finch, Finch told him, "There is a man down the road, Mr. Otto Davis, who will tell us where to go and what to do." From that time on, the operator took orders from Otto Davis [253]. First, they cleared a certain agricultural acreage in the vicinity [261]. Later Davis sent him to the airport and turned him over at the airport to Hank Goodine, foreman for the defendant Wilcox [253]. Wilcox told him what to do at the airport [254]. Later, in connection with the airport operations, Cox, the foreman for the defendant Roeder, also told him what to do [255].

This all happened in spite of the fact that the operator was instructed as follows:

> "Q. And isn't it a fact that at that meeting Mr. Ferguson told you not to move that equipment on any job without the order from Mr. Finch or Mr. Stover? A. I guess it was.
>
> Q. Sir? A. I believe so."

And, on the same page:

> "Q. And isn't it a fact that Mr. Finch also told you on that occasion you must not move that piece of equipment except upon his consent or Mr. Stover's consent to another job? A. Yes, sir.
>
> The Court: Your answer is yes?
>
> The Witness: Yes." [267]

It is true that the operator was unable to tell whether this conversation was before or after the accident, but from the remaining testimony it appears without dispute

that this conversation took place before the accident happened on the airfield.

The operator further told the court that appellants gave him no directions whatever as to how or when to do the agricultural jobs [261]. In fact, it appeared that no instructions were given by appellants after the equipment left their home yard at Burbank. More particularly, with respect to the work on the airport, at which time the accident happened, appellants gave the operator no instructions whatsoever with regard to the manner or method of filling in or leveling or when and where to work at the airport, how to plank over the airport strip on planks, what to do at the airport, and he testified that he received all his orders and directions either from Mr. Davis before he reached the airport, and while at the airport from Mr. Cox and from Hank Goodine [261-263]. His understanding with respect to his relations towards the person for whom he was actually using the tractor at any given time corresponds to that of Mr. Ferguson, and he testified [272]:

> "Q. Now, it is a fact, isn't it, that you were not permitted to allow anyone else to operate that bulldozer while it was in your custody? A. No. If I had not been satisfactory on the job, they had the right to send me home and they could put someone else on.
>
> The Court: You would not have left until another operator appeared, would you?
>
> The Witness: No sir. I would not, not as long as I was sent out there. I might not have operated it."

Next, in logical order, is the testimony of cross-defendant **Finch.** He testified that he made an oral agreement

with Ferguson of appellants with respect to the use of the tractor in question for agricultural work [211]. Finch was not in the state when the accident occurred, but left his business and equipment in charge of Joe Stover [212]. He in turn permitted this equipment to be used for Otto Davis and Meyers under arrangements which are set out on pages 214-215 of the transcript. It appears there that the work which was being done at that time had exclusively to do with farmers, that Finch made a small profit of a dollar an hour in letting Davis and Meyers have this equipment, that Davis and Meyers did additional work for which they also charged, and that it was usually a race between Davis and Meyers and Finch as to who would get to the farmer first to collect the money. Finch, however, knew nothing about any airport job, nor, until after the accident, that the equipment was ever moved to Palm Springs, and he testified that had he been approached on the subject he would not have given his consent to it [216]. He told them, however, not to take the tractor anywhere, not even across the road, until they notified him.

He did not know Wilcox or Roeder or that the equipment ever found its way to them. He did not authorize this tractor to be used for anything other than pushing trees and agricultural work [221]. When he came back from New York, Davis brought a bill, directed to Wilcox, for payment, and he said to Davis, "I don't want any part of it. You had no business to take the tractor down there." And then he wrote on the bill, "This tractor was taken on this job without my consent" [225-226].

The tractor in question was supplied with a carry-all, which is in the nature of additional equipment. This

did not belong to appellants, but it was not being used on the particular job where the accident occurred [229].

Joe Stover, who was left in charge of Mr. Finch's interest while Mr. Finch was out of the state, testified that Mr. Finch told Davis and Meyers not to move any of the equipment without first consulting Stover [232]. They said that they would consult him first if Mr. Finch wasn't on the job [233]. However, he was not consulted either by Davis or Meyers concerning the moving of this equipment to Palm Springs Airport [234], and did not find out that the accident had happened until one day thereafter, although, missing the equipment in the interval, he had been out looking for it [234-235].

Otto Davis testified that he had never been in appellants' office or made an attempt to make any arrangements with them [243-244]. While he was doing agricultural work, he was approached by Hank Goodine to see whether the equipment could be used on the airport for a few days, and Davis told him that he would have to see the farmer first for whom he was doing farm work to see whether the farmer would let the equipment out during that time [245-246], and thereupon told Hank Goodine, after the farmer had told him that it was all right, that the equipment would come down. This done, he told the operator to hook onto it—tie his dozer up and hook onto the carry-all and take it down to Palm Springs Airport [246].

The operator did not say anything at all to this order, but did as he was told. Davis denied having been told

by Finch that such a switch of equipment was improper and that he would have to get Finch's authority for any change [247], but he does admit:

> "I never did consult Mr. Finch regarding moving it from one job to another whenever I had a job. Whenever I had a job, I moved that piece of equipment and as soon as Mr. Finch would find out where it was, after it was moved, he would immediately contact the farmer and tell the farmer not to pay Davis and Meyers but to pay Finch" [247].

Davis knew that the equipment belonged to the appellants [247], and he also testified that he never leased the equipment from them himself [251].

When the equipment got to Palm Springs it was turned over, with the operator, to Hank Goodine, foreman of Jack Wilcox, and he in turn arranged to turn both the equipment and the driver over to Walter S. Roeder. It was while the machine was in use, which Walter Roeder's foreman had directed him to do, that it backed into the parked airplane, damaging the same.

Assignment of Errors.

1. The evidence in the record does not support the findings of fact, more particularly in the following respects:

> (a) The evidence does not sustain the finding of fact that Clarence A. Davis, the operator of the equipment, acted in the scope of his employment with the appellants [Finding 9, Tr. 115].
>
> (b) The evidence does not sustain the finding of fact that appellants continued to have the right to exercise control over the equipment and the

manner of work which was to be performed by it [Finding 9, Tr. 115].

(c) The evidence does not sustain the finding of fact that the cross-defendant other than appellants did not exercise control over the management of the equipment [Finding 12, Tr. 116].

2. The findings of fact are inconsistent in that they find that Clarence A. Davis, the operator, was the special employee of cross-defendants Wilcox and Roeder, and yet finding that Wilcox and Roeder had no right to control the equipment [Finding 12, Tr. 116].

3. The findings of fact do not support the conclusions of law, for if Wilcox and Roeder were special employers and had therefore the right of control, they were responsible for the accident.

4. The judgment is contrary to law in the following particulars:

(a) In that it holds appellants liable rather than the special employers.

(b) In that the evidence conclusively shows that neither Finch nor Davis and Meyers had the right to operate the equipment on anything but agricultural land or beyond the places indicated in Exhibit E, or for anybody except those whom Finch would designate.

We shall not discuss separately each of the various assignments of error, but they can be adequately and completely comprised under the two following general headings:

Questions Involved.

I.

Where one who lends equipment and a servant to operate it to another and where the latter directs how, when, and where the equipment is to be used and what is to be done with it, and where such other person also has the right to reject the person operating it, such latter individual renting the equipment becomes, as a matter of law, responsible as the employer for the negligent operation of the equipment, and the lender of the equipment is, as a matter of law, exonerated.

II.

Where the owner of equipment lending it to others together with a servant places certain restrictions on its use, stating that it can be used only for agricultural work and only at a certain place and only upon the express direction of a designated individual, and where such owner, moreover, does not get or accept compensation for its unauthorized use from an unauthorized user, the servant operating the equipment has placed himself outside the scope of his employment so that as a matter of law the master as general employer is not liable for any injuries resulting from acts while the employee so operates it.

ARGUMENT.

I.

A Servant Who Is Directed or Permitted by His Master to Perform Services for Another May, Where the Effective Control Over the Servant Shifts to the Other, Become in Fact the Servant of the Other to Such an Extent That Not the Original Master but the Other Is Liable for the Tortious Acts or Negligent Acts of the Servant.

The discussion under this point proceeds as though the use of the tractor and operator on the airport by Roeder were pursuant to an agreement of hire, and that Roeder had a right to use both the tractor and the operator. This is, in fact, not so. But even if it were the case, every cross-defendant, from Finch to Roeder, would be in such a position of control as to exonerate appellants from the consequences of the accident.

The general rule with respect to loaned servants and the respective liability of lender and lendee is well expressed in 16 Cal. Jur. 1108, as follows:

> "In order to create a liability for the acts of an alleged subordinate, not only must the relation of master and servant exist, but *it must exist at the very time and in respect to the very thing out of which the injury arose** An employee may be in general service of one person and, nevertheless, with respect to particular work, may be loaned or hired or otherwise transferred to the service of another; and if as regards the particular service for which he is so loaned or hired he is subject wholly to the direction or control of the other, the latter and not the general em-

*All italics, unless otherwise noted, are ours.

ployer is the master so far as the particular or special service is concerned, and is liable for injuries caused by the negligent and wrongful acts of the servant while engaged in the duties pertaining to such service. But when a master hires out under a rental agreement the services of an employee for the operation of an instrumentality owned by the master, together with the instrumentality, without relinquishing to the hirer the power to discharge such servant, to go where and perform such work as the hirer directs, the presumption is that, although the hirer directs the servant where to go and what to do in the performance of the work, the servant, as the operator of the instrumentality employed in the doing of the work, remains, in the absence of an agreement to the contrary, the servant of the general employer in so far as concerns the manner and method of operating the instrumentality and the negligence of the servant is that of the owner of the instrumentality."

The quotation shows plainly that the operator in this case not only fulfills every specification of a loaned servant but he even falls within the exception given in the quotation where there is a rental agreement of an instrumentality owned by the master who lends the instrumentality to another together with the servant: In this latter event, *if the lessee has the power to dismiss or reject the servant* and is not bound to retain him for the work in question, the loaned servant doctrine will apply.

It appears without dispute in the transcript, from Mr. Finch, the lessee, from the appellants as the lender, and from the operator himself that he could have been sent back by the lessee and discharged from the particular job for which he had been hired out.

But the foregoing alone does not completely solve the problem. The further question arises: Who has control at the moment when the injury occurred? It is entirely possible that in an arrangement between general and special employer the control is so divided that at one time the general employer has control and at another time the special employer has control. This possibility of divided control in point of time is clearly demonstrated by the authority on the basis of which the trial court erroneously made its decision herein, to wit, *Billig v. Southern Pacific Co.*, 189 Cal. 477. In that case, certain trucks were being loaned. The special employer had the right to tell when, how, and where they were to be loaded. After they were loaded, the control over the trucks remained with the driver furnished by the general employer. He had a choice of route which he wanted to pursue and while going from place to place was entirely free from the direction of the special employer. In analyzing the situation to see who ought to be held for an accident which occurred in transit after the loading had been done and while the truck was en route from one place to the other, the court said (p. 484):

> "That is to say, who was Pratt (the driver) bound to obey concerning the control, management, and operation of the auto truck *after it had been loaded in keeping with the desires and direction of Geiger and while it was in transit between the place of loading and the place of delivery?* (Citing cases.)"

In our case the question is precisely identical: Who could tell the operator what to do at the moment when the accident occurred? Was he at that moment under the direction of Roeder or under the direction of the general employer?

A moment's reflection will show that at that moment he was exclusively and solely under the direction of the special employer. An analysis of the situation reveals this: That once the equipment left the yard of the appellants and was actually delivered on the spot the person who determined time, place, and circumstances of the use of the tractor was the special employer. Indeed, it is apparent that the operator controlled nothing except the mechanics of the instrumentality. Even if appellants had had an agreement with Roeder who was directing the operator at the moment, they could not have done anything to effectively control him at that time.

Take, for instance, any agricultural job which this tractor might be required to do. It does not take any knowledge of agriculture or any knowledge of the tractor business to know, under the situation, that it was at all times the special employer who would have told the operator when to start in the morning, when to stop in the evening (barring always unforeseen union rules, over which neither the special nor the general employer has any control), where to start, where to stop, which stump in an orchard to take up first, what side of the land to level first, whether to take up stumps first or to level first, whether to make a ditch first or to fill in a ditch first, where to get the dirt for leveling or where to pull the dirt left from leveling, how to slope the land, at what grade to slope it, whether from east to west or from north to south, and how to approach the field. And could anybody doubt that if the special employer had said to the operator: I want you to decrease your speed, or I want you to wait until I sprinkle this area, so that there won't be any dust, or I don't want you to level

between two and four, or any other of a thousand things, the operator would have been required to do it?

In this particular instance, the person for whom the tractor was doing the work had the absolute control to tell the operator whether to approach the job from one side or from the other, whether to level on the left or on the right side first, how to drive over the air landing strip, when to start, when to stop, when and where to back and when not to back, what speed to pursue, just as it fitted his other operations which were undoubtedly and continuously going on at the time, or even as it suited his whim!

Even Davis had the right to tell the operator whether to take along a carry-all on the trip, what way to pursue, where to go up the wash, and how to approach the airfield.

There can just be no question whatever that all effective controls vested in the special employer and that outside of paying the operator appellants had no privileges whatsoever.

In this case, not only did the appellants have no control over the situation, *they did not even have a way of exercising it, if it were in existence, because they did not know where the equipment was or who was presuming at the time to give their general employee directions as to what to do.*

A few California cases will demonstrate this rule more clearly. *Cotter v. Lindgren,* 106 Cal. 602, 39 Pac. 950, is a case in which the servants were loaned to a special employer to dig pits under the direction of the special employer. The special employer told them to place guards around the pits, which they failed to do, so that the plaintiff fell into the pits. It was held that the general

employer was not liable because he had no power of supervision as to the digging of the pits. So here, the general employer has no power as to the supervision of the grading of the airstrip.

Another instructive case is *Burns v. Southern Pacific Co.,* 43 Cal. App. 667, 185 Pac. 875. In that case, the first master hired a truck and driver to the second master. While driving to the station by direction of the second master, the driver negligently caused a collision resulting in the death of the plaintiff. It was held that the first master was not liable. It will be noted that this is in exact reverse of the case of *Billig v. Southern Pacific Co.,* 189 Cal. 477-485; 209 Pac. 241, already referred to. In that case, the trip was not made nor the supervision exercised by the special master; the thing the special master controlled, namely the loading, was no longer going on. Hence it was held in the *Billig* case that the general master was liable. Had the accident in the *Billig* case happened during the loading, even though the driver was in the general employ of the first master, the court would have been compelled to hold that the first master was not liable and the second master was.

So here, in our case, *it is inconceivable that at the time when the airstrip was being leveled and while the operator was driving the tractor up and down, appellants could have stepped on the field and told him to do it differently. To say that at that moment appellants exercised any control over this equipment is to abandon all sense of the actualities in this case.*

Another instructive case is *Burns v. Jackson,* 59 Cal. App. 662, 211 Pac. 821. In that case, the second master, or special master, was held responsible for the negligence

of the servant which he hired from the general employer because, at the moment of the accident, the special employer had control.

Another case which should be cited here is *Peters v. United Studios, Inc.,* 98 Cal. App. 373, 277 Pac. 151. In that case, the general employer hired a tractor to the special employer, telling the servant "to do whatever they want done." The servant injured the plaintiff and the question was whether the general employer had surrendered full control of the servant to the special employer. This was determined in favor of the general employer, in spite of the fact that at the time the manner of management of the tractor, namely, what lever to pull, what gasoline to use, etc., was none of the concern of the special employer.

The case of *Callahan v. Harn,* 98 Cal. App. 568, 277 Pac. 529, is closely in point. Here, the general employer loaned the servant and the truck to the special employer by the month. The servant received his orders from the special employer. The servant was negligent in handling the trailer, injuring the plaintiff, who recovered from the special employer but not from the general employer.

A more recent case is *Kimball v. Pac. Gas & Elec. Co.,* 23 P. (2d) 295, also reported in 220 Cal. 203, and 30 P. (2d) 39. In this case, the employee, while under the control of the special master, dropped a bolt on another employee, and the special master in this case was held liable.

If those cases in California are scrutinized, in which the general employer was held liable, *it will be seen in each and every instance that the accident occurred at a time or during an operation which was exclusively con-*

cerned with the general employer and as to which the special employer had nothing to say.

In view of these many cases, it is unnecessary to refer extensively to cases from other jurisdictions, but a few of them are given in the belief that they clarify the issues still further.

In *Meyer v. All Electric Bakery, Inc.,* 271 Ill. App. 552, the general employer sent his employee with a mule to the special employer and told his employee to do whatever they told him at the baking company. This was done, and injury occurred by reason of the negligence of the servant. Needless to say, the general employer was exonerated and the special employer was held *in spite of the fact that the servant remained at all times on the payroll of the general employer.*

In the case of *Counihan v. Lufftuska Bros.,* 118 Cal. App. 602, 3 P. (2d) 694, the rule laid down is that the person who should be held liable is the one *who controls the mode and manner of the work performed at the specific moment.*

The United States Supreme Court has discussed the question in *Benton v. Yazoo & N. V. R. Co.,* 52 Sup. Ct. 141, 284 U. S. 305, 76 L. Ed. 310. In that case, it was held that where one person puts the servant at the disposal and under the control of another to perform particular service for such other, such other is to be considered the employer responsible for the acts of the servant.

In the case of *Mississippi River Fuel Co. v. Morris,* 183 Ark. 207, 35 S. W. (2d) 607, a contractor employed and *paid* drivers of teams which he hired out to another company. The foreman of the other company directed

their work. Held that the other company rather than the contractor was liable.

Western Marine and Salvage Co. v. Ball, 37 F. (2d) 1004, the contractor furnished a crane and operator to the buyer of scrap iron and left it to the buyer to direct when and how it should be operated. Held, that the buyer became the employer of the operator for the purposes at hand.

In *Carlson v. Sun Maid Raisin Growers Assn.,* 121 Cal. App. 719, 9 P. (2d) 546, there is a *dictum* to the effect that *had the special employer had a voice in the retention of the furnished employee* he would have been the one held responsible rather than the general employer.

The best test that we have found laid down in the cases is found in *Liever v. Nessick,* 173 N. E. 238, 92 Ind. App. 264. In that case, it was stated that the test is: *Who had the right to direct and control the agent in the performance* OF THE CAUSAL ACT OR OMISSION? The causal act or omission in this case was the backing of the tractor. That was not under the control of the appellants nor of Finch nor of Davis. *They could not say whether the tractor was to be backed or not.* This was exclusively under the control of the persons contracting at the airport.

In conclusion of this point we desire to quote from *Bowen v. Gradison Construction Co.,* 32 S. W. (2d) 1014, 236 Ky. 270, because it is on all fours with the case at bar and the reasons and the illuminating discussion of the court in its well-reasoned opinion will be of great help in the proper solution of this case. We read:

> "Richards furnished his truck and the driver, oil, gasoline, and everything else necessary for its op-

eration, and the Gradison Construction Company paid him $2.50 an hour for its use. Richards hired and paid this driver, and Gradison Construction Company had no right under the contract to discharge him or to put upon this truck a driver of their selection, but they had the right to send the truck home and terminate this contract when they chose. The Gradison Construction Company directed the loading, unloading, and operation of this truck.

"The questions on this appeal are:

"(a) Was there any evidence the injuries sued for resulted from the negligent operation of this truck?

"(b) Had the Gradison Construction Company such control over it as made it responsible for that negligence?

"The trial court gave a negative answer to question (b), and hence did not answer question (a). We find both questions should be answered in the affirmative. When the Gradison Construction Company made this contract with Richards, it, in effect, said to him: 'Your driver shall be our driver and your truck, our truck, so long as we shall both be pleased.' The pronoun 'our' is used here to refer to the Gradison Construction Company alone, and not to it and James Richards. . . .

"We wish to call attention to some evidence upon which the construction company relies. This is taken from Gradison's testimony:

" 'Did you have any control over Richard's driver?

" 'No, I didn't know who he was.

" 'Did you hire the driver of that truck?

" 'No.

" 'Did you exercise any control or have the right in your contract to exercise any control over the way the truck should be driven?

" 'No.'

"This is from the testimony of James Richards:

" 'Who hired Owen Richards to drive the truck?

" 'I did myself.

" 'Did Mr. Gradison have any right under your contract to tell you who should drive the truck?

" 'He did not.

" 'Did he have any right to hire a driver and put him on your truck?

" 'He did not.

" 'Did he have any right under the contract to direct how the truck should be run over the road?

" 'He did not.

" 'Who paid the driver of the truck?

" 'I did.'

"Both of these witnesses testify, in fact, all of the evidence is, that either Richards or Gradison could terminate this contract at any time.

"We grant that ordinarily Owen Richards was the servant of James Richards, but a servant may be loaned or hired by his master for some special purpose so as to become, as to that service, the servant of the party to whom he is loaned or hired, and this is true even though the servant is selected, paid, and may be discharged by the original employer. 39 C. J. 127, sec. 1462. The test turns on who controls the servant in the named employment.

"Here the construction company hired from Richards a truck and a driver; they were hired as an entity; neither could be retained or discharged alone.

This entity was hauling material belonging to the construction company, to be used in the making of a street the construction company was building, and the question is: Was Owen Richards then the servant of his father, James Richards, an independent contractor, as Givans was the servant of Berry & Kelly, or was he the servant of the construction company? We are not interested in whose servant he was ordinarily, but whose servant was he while on the job at work under this contract? Who was then his master? Suppose the foreman of the construction company had said to Owen Richards: 'Bring a load of sand first thing in the morning.' Would he have hesitated one moment about whether or not he had that to do. Suppose he had that night stated his contract fully to the first ten men he met and asked each of them, 'Must I haul this sand?' Does any one for a moment doubt what the answer would have been? With the power of discharge in his hands the construction company held control of this truck and driver . . .

"The trial court's finding was that, under the contract between it and the owner of the truck, the driver of the truck was not the servant of the Gradison Construction Company, but we regard this as error. That was equivalent to a finding that James Richards was an independent contractor, for which there is no support in this evidence.

"The facts about the contract involved are in no dispute. The finding of the trial court upon undisputed facts is a finding of law, and is not conclusive on appeal. 4 C. J. 882; 2 R. C. L. p. 208, sec. 173 . . ."

Thus the Appellate Court required the reversal of this judgment and insisted on a finding that the general employer was not liable.

The general employer in the case at bar should be exonerated on still another principle. The rule we have in mind may be stated as follows:

"If a hired motor vehicle is used for a purpose different from that stipulated in the contract of hiring, the driver is not the agent of the owner in using it at the direction of the hirer, but the hirer becomes the employer responsible."

42 C. J. 1098;

Blue Bar Taxi Co. v. Hudspeth, 25 Ariz. 287, 216 Pac. 246;

Fritz v. Hochspeier Co., 287 Ill. 574, 123 N. E. 51.

Since both of the above cases are very instructive, we shall quote from each of them. In the *Blue Bar Taxi Co.* case we read:

> ". . . The defendant directed its driver, named Butler, to take one of its cabs, and go to a designated place in the city of Tucson, and get Hudspeth and one other. The driver was instructed not to drive the cab outside the city of Tucson; that it was an unsafe vehicle for driving upon country roads. Butler picked up Hudspeth and one Colvin and carried them in his cab to a point near to the city limits of Tucson, where they alighted, and after a time returned and directed Butler to drive them out into the country beyond the city limits. Butler told Hudspeth and Colvin that he was not permitted to take the cab outside of the city; that it was contrary to the instructions he had received from his employer; but

that he would return to headquarters and get a touring car. This offer was declined. Hudspeth and Colvin then entered the cab and directed the driver to proceed out into the country along a road designated by them. Following the directions of the officers, and because of their supposed authority, Butler drove to a railway station 16 miles, or thereabouts, outside the city of Tucson, where Colvin was left, and where Butler received further instructions from Colvin and Hudspeth to drive back as rapidly as possible to Tucson with Hudspeth. On the way back another car was met, which crowded Butler off the road, and in attempting to recover the highway the car skidded in the sand, struck a small embankment, and overturned, injuring Hudspeth.

"At the time of the accident and prior thereto, the defendant furnished conveyances to the sheriff of Pima County under a continuing agreement that taxicabs of the sort used at the time of the accident should not be taken into the country, or outside the city of Tucson. The terms of this agreement were communicated by the sheriff to all his deputies, with the instruction that it was not safe to take taxicabs of this type upon the country roads. With a few well-defined exceptions affecting places near Tucson, defendant never permitted its drivers to take cabs of this sort beyond the city limits, because, among other things, of their light and top-heavy construction, and liability to overturn. Instructions to that effect were given to all their drivers, including Butler.

"Verdict and judgment were against defendant.

". . . This agreement resulted in a contract of bailment for hire, by the terms of which the particular subject of the bailment involved in this action was to be used in a certain definite way, and within cer-

tain specific limitations. The sheriff had the right to use the taxicab within the city of Tucson. He had no right to use it beyond that limit, and if he did use it beyond that limit it was in violation of his contract. Hudspeth by pleading and proof is identified with the sheriff both as to rights and liability. His claim is based upon the contract of hire made with the sheriff; his rights are measured by the terms of that agreement.

"The bailee for hire is not permitted to use the subject of bailment for any other purpose than the purpose named in the contract, or for such purpose as may be implied from the contract. Any use different from the use prescribed by the contract would be a misuse of the subject of bailment, and the bailee would thereby become guilty of conversion.

"The driver of the taxicab, during the period of its perversion from its use as provided by the agreement, was not using it at the direction of the owner, but was using it under the direction of Hudspeth; and the negligence of the driver under such conditions cannot be imputed to the owner. By such perversion of use there was involved a hazard not contemplated nor agreed upon by the contract of hiring. Defendant could not be held liable for the negligence of the driver, because the hazard was one it had not agreed to assume. Hudspeth could not claim such liability, because it arose in the course of his own wrongdoing in violating the contract of hire. The driver was not serving the defendant in violating its express order, and in following the direction of plaintiff in violation of the contract of hiring. Stone v. Hills, 45 Conn. 44, 29 Am. Rep. 635."

Blue Bar Taxi Co. v. Hudspeth, 25 Ariz. 287, 216 Pac. 246.

And the *Fritz* case has the following to say:

". . . The contract between Hinze and plaintiff in error was a bailment for hire, and the law fixes the right of the parties to such a bailment. The bailee has the right to make use of the thing in accordance with the contract, but he has no right to make use of it in any other way or for any other purpose. If a bailee for a special purpose uses the property for another purpose he is liable as for a conversion, and if the use occasions injury or damage the owner is not liable. If a hired vehicle is used for a purpose different from that stipulated in the contract the driver is not the agent of the owner in using it at the direction of the hirer. [Citing cases.]

"The plaintiff in error claimed that the automobile was hired to go to Forest Home Cemetery, on the west side of Chicago, and that in violation of the contract it was sent in a different direction to Montrose Cemetery on the north side, and offered the testimony of the employe who took the order to prove the fact alleged. If the contract was that the automobile was to go to Forest Home Cemetery, Hinze, as bailee, had no right to make use of it in any other way or for any other purpose, and the plaintiff in error would not be liable for any damages resulting from the unauthorized use of the automobile. If the automobile had gone to Forest Home Cemetery the accident at North Crawford and Wilson avenues would not have occurred."

Fritz v. Hochspeier Co., 287 Ill. 574, 123 N. E. 51.

II.

Assuming That the Employee Operator Remained the Employee of the Appellants to Such an Extent That, All Other Things Being Equal, They Would Ordinarily be Held Liable for His Conduct, Nevertheless, in This Case, They Are Not Liable as a Matter of Law Because There Was a Complete and Total Departure From the Scope of the Operator's Employment.

This second point is, in a degree, inconsistent with the First Point. So far we have assumed—an assumption which is hard to make in the light of the fact that appellants never leased the operator and equipment out to Roeder, either directly, or through one authorized to do so for them—that the operator was in the regular general course of his employment, with control over him abandoned to a series of special employers. Now, however we assume that even if general versus special employment should not be found here, and even if appellants were held never to have abandoned control, nevertheless, the operator so completely departed from his employment as to exonerate the appellants.

We do not believe it necessary to tire the court with cases that *a master is not liable for the torts of his servant when there is an utter departure from the master's instructions as to time, place, and type of work.* However, we quote from Shearman and Redfield on Negligence, par. 157 in the Revised Edition, as follows:

> "The fact that the servant was, at the time of the injury engaged in the service of his master, is not conclusive of the master's liability. The mere fact that one is master and the other servant does not, of

itself make the master responsible for any act or omission, which has no relation to the servant's employment. The act complained of must be within the scope of authority which the servant had from the master, of which the master gave the servant reasonable cause to believe that he had, or which servants employed in the same capacity usually have or which third persons have a right to infer from the nature and circumstances of the employment. *The mere fact that the injury complained of was caused by negligence of the servant in the performance of an act which, taken per se, was within the scope of his employment, will not impose a liability upon the master, if the act was merely incidental to the servant's attempt to perform an act entirely beyond the scope of his authority.*" (Italics ours.)

Beyond the mere fact, therefore—and it is indeed the only fact indicating anything about the scope of the operator's employement—that he was managing a tractor belonging to appellants at the time, there is no indication whatever that he was acting in the course and scope of his employment. On the contrary, the entire transcript is replete with proof that in every conceivable particular he had placed himself outside the scope of such employment.

He had no roving commission to go about the countryside, picking up tractor work. In the first place, he was instructed to perform his work at a particular place and not to remove therefrom unless he had had specific instructions to do so. His airport trip was not merely a slight deviation from this instruction, but a deviation of between 14 to 17 miles—unless one cares to call such a deviation

trivial when a tractor is involved which has to be moved for such a distance not under its own power but on a low-bed truck.

Secondly, at the time in question, the operator was not working for anyone for whom he had been authorized to work. If Finch had sent him to the airport or if Stover had sent him there or if Finch had even told the operator that he was to take all further instructions from Davis rather than from Finch or Stover, a point might be made that the person for whom he did the leveling work at the moment of the accident was within the line of his occupation; but the evidence, even after it is subjected to considerable stretching and stress, will not fit into such a pattern.

In the third place, the activities at the particular location at which they were going on were in the face of a specific prohibition, to which not only the operator himself but Ferguson for the general as well as Finch, the special employer testified. Certainly, under these conditions, it cannot be said that there was an authorization to perform that particular work at that particular time.

Finally, it appears that the appellants did not even get the financial benefit or compensation of this particular transaction. Neither Roeder nor anyone else paid appellants for this particular work. That tractor was out on a rental to Finch on a minimum monthly basis, *whether it was used or not.* Therefore, not the slightest benefit could result to the appellants herein by reason of which they

might be said to have ratified the departure. It is the same as if, without explanation and in the face of specific instructions not to do so, the operator had gratuitously absented himself and done a favor to one of his friends. We are, of course, not to be understood as implying that any improper motive impelled the operator to do what he did here, *but that he had not only no instructions to do it but a specific admonition not to do it unless he had a previous authorization, there can be no gainsaying.*

The foregoing observations are not idle because it was of paramount importance to the general employer to determine whom the operator was to work for, where he should work, and what he should do. He was to do only agricultural work. The type of work which he undertook materially prejudiced the employer, not only by reason of the enhanced insurance rate but also by reason of the unorthodox and inexpert manner in which the equipment was dragged by its own power over the highway and up a wash some 17 miles from one job to another.

As already stated, we shall not cite or analyze cases. Their name is legion. Each of them has to stand on its own peculiar facts. Sometimes the deviation is slight, in which case the cases overlook it and hold that the employment has not been interrupted. Here it is patent, flagrant and in utter disregard of the master's purposes. We contend it is plain as a matter of law that a most striking deviation occurred, which leaves nothing for the court to do than to reverse the judgment.

Conclusion.

In conclusion, it is respectfully submitted:

That as a matter of law the operator became the employee and was under the complete control of persons who sustained no relationship and had no rights as against the general employer and that they therefore became the actual master of the operator and are exclusively liable for the things which transpired.

That the operator, if the general employer is held to have had control over him and to remain liable on general principles, in this case so completely deviated from the place, time, person, and manner in which he was to operate his equipment that the deviation cannot be called harmless or trivial but must be considered as a matter of law to be a deviation sufficiently serious to completely take the operator out of the scope of his employment.

For the foregoing reasons, it is respectfully submitted that the judgment should be reversed.

Respectfully submitted,

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